B v P

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S2-33-238 OF 1997
KAMALANATHAN RATNAM J
2 MARCH 1998

Family Law *— Divorce — Desertion — Intention or animus deserendi forming after involuntary separation — Whether respondent had intention to desert petitioner — Burden of proof*

Family Law *— Divorce — Desertion — Constructive — Conduct amounting to*

Words and Phrases *— 'Desertion'*

In this petition for divorce, the petitioner contended that the marriage had irretrievably broken down. The petitioner alleged that on 22 January 1995 he saw the respondent's family coming to his house. He alleged that one of the respondent's brothers demanded that the respondent be sent back to her family and had threatened to assault him. The respondent then left the matrimonial home with her family after having lunch at the petitioner's sister's request. The petitioner made a police report of the threat to his person and of his wife leaving him. The petitioner maintained that he had undergone much embarrassment and suffering and that his wife had abandoned him. He maintained that she never listened to him and they never had a happy six months together. The respondent denied the various allegations made in the petition against her. It was her contention that she was forced to leave the house and she had made many attempts at reconciliation since leaving the house. She had been to the house, written letters and sent cards to the petitioner and had even tried calling him over the phone with no response. Under cross-examination, the respondent agreed that she could live happily with the petitioner even though she had lived separately for more than two years, if he co-operated.

Held, dismissing the petition:

(1) The linchpin of the petition was desertion as of 22 January 1995. The petitioner had alleged that the respondent had deserted the petitioner for a continuous period of at least two years prior to the filing of the petition. Whilst there is no definition of the word desertion, strictly speaking, it means the separation of one spouse from the other with the intention of permanently bringing the state of marriage to an end without reasonable and proper course and without the permission of the deserted spouse. From this, it becomes apparent that for desertion to be a ground, the petitioner must satisfy the court that there was the physical act of separation and equally of importance the animus deserendi, namely the

intention to permanently bring cohabitation to an end. The burden of proof remained with the petitioner. A

Looking at the facts of the case, whilst the fact of separation for two years had been shown, the petitioner had failed to show the respondent had intended to bring cohabitation permanently to an end (see p 792F–H). B

(2) The question arose as to whether the court ought to consider constructive desertion. But the irony was there was no cross-petition and the respondent in her evidence clearly evinced an intention of giving her marriage another chance. She did not on her own steam want a decree (see p 793B–C). C

[Bahasa Malaysia summary

Dalam petisyen ini untuk perceraian, pempetisyen menghujahkan bahawa perkahwinan telah retak dan tidak dapat dipulihkan. Pempetisyen mengatakan bahawa pada 22 Januari 1995 dia nampak D keluarga penentang datang ke rumahnya. Dia mengatakan salah seorang abang penentang menuntut bahawa penentang dihantar balik ke pangkuan keluarga dan telah mengugut akan menyerangnya. Penentang kemudiannya meninggalkan kediaman suami isteri dengan keluarganya selepas makan tengah hari atas permintaan adik pempetisyen. Pempetisyen telah membuat laporan polis tentang E ugutan kepada dirinya dan mengenai isteri meninggalkannya. Pempetisyen mempertahankan bahawa ia telah menanggung rasa malu dan derita dan bahawa isterinya telah meninggalkannya. Ia mempertahankan bahawa si isteri tidak pernah mendengar cakapnya dan mereka tidak pernah bahagia selama enam bulan. Penentang F menafikan pelbagai pengataan yang dibuat dalam petisyen terhadapnya. Dia menghujahkan bahawa ia dipaksa meninggalkan rumah dan telah banyak kali membuat cubaan untuk perdamaian sejak meninggalkan rumah itu. Dia telah pergi ke rumah itu, menulis surat dan menghantar kad kepada pempetisyen malahan menelefon si suami tetapi tiada jawapan diterima. Di bawah pemeriksaan balas, G penentang bersetuju bahawa ia boleh hidup bahagia dengan pempetisyen walaupun ia telah hidup berasingan selama lebih dua tahun, sekiranya si suami memberikan kerjasama.

Diputuskan, menolak petisyen: H

(1) Asas petisyen adalah 'desertion' pada 22 Januari 1995. Pempetisyen telah mengatakan bahawa penentang telah meninggalkan pempetisyen untuk tempoh berterusan selama sekurang-kurangnya dua tahun sebelum pemfailan petisyen. Manakala tiada tafsiran perkataan 'desertion', sebenarnya, ia I bermaksud pemisahan suami isteri dengan niat menamatkan perkahwinan buat selama-lamanya tanpa cara yang munasabah dan wajar serta tanpa kebenaran suami atau isteri yang ditinggalkan. Dari ini, jelas bahawa untuk 'desertion' menjadi alasan, pempetisyen mestilah memuaskan mahkamah bahawa

terdapat pemisahan secara fizikal dan yang sama penting 'animus deserendi', iaitu niat untuk menamatkan perbuatan berkesedudukan buat selama-lamanya. Beban membukti tetap terletak dengan pempetisyen.

Dengan melihat fakta-fakta kes, manakala hakikat pemisahan untuk dua tahun telah ditunjukkan, pempetisyen telah gagal menunjukkan penentang telah berniat menamatkan perbuatan berkesedudukan buat selama-lamanya (lihat ms 792F–H).

(2) Persoalan timbul mengenai sama ada mahkamah harus mempertimbangkan 'desertion' konstruktif. Tetapi ironi adalah tiada petisyen balas dan penentang dalam keterangannya jelas menunjukkan hasrat untuk memberi peluang sekali lagi kepada perkahwinannya. Dia sebenarnya tidak inginkan perisytiharan (lihat ms 793B–C).]

Notes

For cases on desertion, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1912–1921.

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 60

V Munian (*M Rajasingam & Co*) for the petitioner.
M Kalaichelvan (*Abd Halim Ushah & Associates*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

On 10 July 1994 the petitioner, by way of an arranged marriage, married the respondent and lived with his parents and his younger brothers. There is no issue of the marriage.

Case for the petitioner

The petitioner contended that the said marriage has irretrievably broken down. The parties lived together in the said matrimonial home for only six months. Whilst various allegations were pleaded in the petition, the petitioner contended that on 22 January 1995 at about 1 pm when he had returned from an outing he saw the respondent's family coming to his house. He alleged that two of the respondent's brothers were inside the house and that the respondent's mother was shouting outside the house using vulgar language. He contended that during this time, one of the respondent's brothers demanded that the respondent be sent back to her family. He maintained that the respondent showed eagerness at this

suggestion. When he ordered the respondent's brother to leave the house, the latter refused and told the petitioner's brother that he would definitely assault the petitioner. The respondent then left the matrimonial home with her family after having lunch at the petitioner's mother's request. The petitioner made a police report of the threat to his person and of his wife leaving him. He maintained that neither he nor his mother forced his wife to leave the house. He tried to dissuade his wife from leaving but she shut him up by saying it was no longer his business. She had never returned to the house since.

When asked by his counsel why he wanted a divorce, he maintained that he had undergone much embarrassment and suffering and that his wife had abandoned him. He maintained she never listened to him and he never had a happy six months together. Soon after the marriage his grouse was that he was never shown respect by the respondent's family in their house. The language they used was coarse. Even after the marriage, she had spread news to his sister and brother that she was dissatisfied with his sexual performance which embarrassed him. She also talked about her boyfriends to her family and to him. She had also spread news that she wanted to get pregnant and leave the house. He maintained that he could not live with her anymore as she had used bad words to his friends.

Case for the respondent

She denied the various allegations made in the petition against her. She denied specifically ever using any harsh words against her husband or that she had shown disrespect. She also denied spreading rumours about the petitioner's sex life to his family members. Her evidence was that she had sexual intercourse once a week or not at all. She denied that she had spoken about her boyfriends because she did not have any. She also denied that she wanted to move out to stay with her family because there was no room in her family house.

As for the events that occurred on 22 January 1995, her version was that no sooner had her family arrived at her husband's house when her father-in-law took an iron bar to hit her mother. Her mother then shouted back. Her mother-in-law then told her to pack and leave since her family was there. She had earlier on, on many occasions, told her to leave the house. It was her contention that she was forced to leave the house. Not only did her husband not prevent her from leaving the house, he told her that if she was carrying his child she had better abort it. She had made many attempts at reconciliation since leaving the house. She had been to the house, written letters and sent cards to the petitioner and even tried calling him over the phone with no response.

On 14 December 1995 when the petitioner had undergone a nasal operation in the hospital she visited him, only to be chased out of the room by her husband's father whilst the mother-in-law had told the petitioner to ask her to leave. Her husband in response told her, 'If somebody asked you to leave, please leave the room'.

A She maintained that even now she loved him and hoped she could live together with him and start life afresh. She was prepared to reconcile with the petitioner and in her opinion the marriage had not irretrievably broken down.

B *Court's findings*

Under cross-examination, the petitioner maintained that he did not live apart from his parents as his earnings were very low. He denied that all the problems he had adverted to in court were small problems. He denied that he listened to too many people. He agreed that he did not want his wife to C become pregnant within the first year of marriage. He was afraid his wife would leave him when she became pregnant because she had been spreading rumours to that effect. Whilst denying he listened to all the rumours he admitted listening to some. He agreed that he made no attempts at reconciliation because his wife did not listen to his advice.

D The wife on the other hand under cross-examination agreed that she could live happily with the petitioner even though she had lived separately for more than two years, if he cooperated. When asked specifically under cross-examination:

> What if he doesn't cooperate?

E She answered:

> I just want to stay with him. I'm not asking for anything more.

She denied a suggestion that she did not return to the house after leaving it. Notwithstanding her plea that the petitioner never gave her money, F seldom spoke to her and physically abused her, she maintained that her marriage had not irretrievably broken down because she believed marriage was for keeps. To a suggestion that she had many boyfriends, her answer was that if that was the case hers would not have been an arranged marriage. She maintained that the petitioner disconnected the telephone not because she was talking to boyfriends but because her mother used to G call frequently. She has presently stopped working to take care of her mother who is bedridden. She agreed that she would leave her mother to live with the petitioner. To a question by the court she admitted that at the invitation of the petitioner's sister (not the mother as contended by the petitioner), she had her lunch in the petitioner's house before leaving.

H I am satisfied that the petitioner's grounds for seeking a dissolution are not sufficient to warrant such a declaration by this court. He had even alleged that the respondent had resorted to black magic to make the petitioner listen to her and her family. He led no evidence on this nor did he ever raise it fleetingly. He alleged that the respondent placed sex as being more important than other aspects of life. No evidence was led to I sustain such a charge. It was alleged that from the outset of the marriage the respondent had no desire to live with the petitioner's parents but wanted to live with the petitioner with her parents and towards achieving

this end she was looking for various excuses. However, this cannot be true because the respondent did not have both parents alive as the father had died 10 years earlier. Further, no evidence was led on this allegation. A

I find that the petitioner for reasons best known to himself has been listening to rumours regarding his wife. He even admitted to this.

The only material fact that I ought to consider is his allegation relating to the incident that occurred on 22 January 1995. His entire family was present; yet he called no one to testify. B

I find it incongruous that an angry and upset wife — in the midst of packing her bags to leave her husband or even after packing her bags — would, at the invitation of her sister-in-law, calm herself sufficiently and have lunch in her husband's house before leaving it for good. C

I have seen both parties give evidence and I do not find the petitioner a witness of truth. He was too sure of himself, and smiled often when giving evidence. There was no seriousness on his side to this grave issue.

I find on an evaluation of the facts that the constant harassment of the respondent by her mother-in-law and the impersonal stance taken by the petitioner — coupled with his seeming reluctance towards sexual intercourse for fear of impregnating his wife and his further paranoid fear that she would leave him — had conjointly triggered the respondent to seek refuge in her mother's home. Her reluctance to leave willingly is reflected in her conduct in listening to her sister-in-law and having lunch before leaving. D E

Desertion

The linchpin of the petition is desertion as of 22 January 1995. The petitioner has alleged that the respondent had deserted the petitioner for a continuous period of at least two years prior to the filing of the petition. Whilst there is no definition of the word desertion, strictly speaking, it means the separation of one spouse from the other with the intention of permanently bringing the state of marriage to an end without reasonable and proper course and without the permission of the deserted spouse. From this, it becomes apparent that for desertion to be a ground the petitioner must satisfy the court that there was the physical act of separation and equally of importance the *animus deserendi*, namely the intention to permanently bring cohabitation to an end. The burden of proof remains with the petitioner. F G

Looking at the facts of this case, whilst the fact of separation for two years has been shown, the petitioner has failed to show that the respondent had intended to bring cohabitation permanently to an end. H

As I have said, I do not find the petitioner a truthful witness. The demeanour and conduct and frank utterances of the respondent in court has satisfied me that she was ever willing to return to cohabitation. The petitioner said that he was unable to have a separate home because his income was low and that he had to support his family and that he had to take care of his mother who is suffering from heart problems. Yet the petitioner admitted that he was earning a basic salary of RM2,130. No I

A explanation was given as to why his other siblings could not support the family, nor why the salary he was earning was insufficient for him to maintain a separate home.

At the outset, the parties agreed that all ancillary reliefs were to be considered on another date and that I was to only decide on the issue of
B granting a decree or not.

The question then arises as to whether I ought to consider constructive desertion. But the irony is there is no cross-petition and the respondent in her evidence has clearly evinced an intention of giving her marriage another chance. She does not on her own steam want a decree. Her counsel, on the other hand, has relied on the general prayer for relief, namely for such
C order that the court thinks as fair and just.

In his submission, Mr Kalaichelvan for the respondent further relied on s 60 of the Law Reform (Marriage and Divorce) Act 1976 to persuade the court to grant a decree if the court finds sufficient grounds to merit the granting of such a decree of divorce.

D Section 60 reads:

> Hearing of petition
>
> If in any proceedings for divorce the respondent alleges against the petitioner and proves any such fact as is mentioned in section 54 the court may give
E the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief.

To my mind, the key words here are 'seeking that relief'. Other than in the submission, the respondent has made no indication of her intention to seek that relief.

F A submission by counsel must be based on facts and evidence led in court. A wish of counsel need not necessarily be the want of his client. Even at the late stage there was no application to amend.

Regrettably, I cannot consider any evidence that might warrant granting a divorce on behalf of the respondent in the absence of a clear and
G unambiguous evocation of such a plea.

In the circumstances, I am constrained to dismiss this petition with costs.

Petition dismissed.

H Reported by Eugene Lee

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